

2.0 BACKGROUND

2.1 INTRODUCTION

2.1.1 2000 FCRPS Biological Opinion

NOAA Fisheries issued the 2000 FCRPS Biological Opinion on December 21, 2000, at which time NOAA Fisheries found that the action proposed by the Action Agencies in their 1999 Biological Assessment was likely to jeopardize eight listed species of Columbia Basin salmon and steelhead and their designated critical habitats. NOAA Fisheries also recommended a reasonable and prudent alternative (RPA), pursuant to ESA § 7(b)(3)(A) and 50 CFR § 402.14(h)(3). The Action Agencies subsequently decided to implement the recommended RPA through their respective decision documents.

The RPA recommended an adaptive management framework for planning and implementing a program of operations at the FCRPS projects, a program of non-hydro offsets, and a program of research, monitoring, and evaluation necessary to ensure that the FCRPS continued to meet the requirements of Section 7(a)(2) of the ESA for ten years. The RPA proposed a suite of 199 default actions to be implemented by the Action Agencies with the understanding that alternative actions could be substituted for the default actions through the planning framework provided they were at least equally as effective as the default action they replaced. Further, the RPA recommended performance expectations and regular reporting to ensure that the ESA standards were met throughout the ten-year period.

Since implementation of the 2000 Biological Opinion began in 2001, the Action Agencies have documented and explained a number of adjustments to initial RPA actions in their annual implementation plans and progress reports. These revisions have been evaluated by NOAA Fisheries and documented in its annual findings letters. For example, some actions have been completed, some have been modified, some have been better defined, and some have been augmented. As a result, the precise wording of the 199 RPA actions is not the most current or accurate description of hydrosystem operations or non-hydro offsets called for by NOAA Fisheries' 2000 RPA.

2.1.2 National Wildlife Federation v. NMFS Remand Order

NOAA Fisheries' 2000 Biological Opinion was challenged in the case *National Wildlife Federation v. NMFS*, CR 01-640-RE (D. Oregon, *filed* May 5, 2001). On May 7, 2003, District Court Judge James A. Redden found the 2000 Biological Opinion invalid, and he remanded that biological opinion to NOAA Fisheries on June 2, 2003 to consider revisions consistent with his Opinion of May 7, 2003. The Court also decided that the 2000 Biological Opinion should remain in effect while NOAA Fisheries and the Action Agencies developed changes in response to the Court's concerns.

“ . . . [T]he court agrees with NOAA Fisheries and the State of Oregon that remand is appropriate in order to give NOAA Fisheries the opportunity to

consult with interested parties to insure that only those range-wide non-hydro Federal non-hydro offsetting actions which have undergone section 7 consultation, and range-wide non-hydro non-Federal offsetting actions that are reasonably certain to occur, are considered in the determination whether any of the 12 salmon ESUs will be jeopardized by continued FCRPS operations.” May 7, 2003, Opinion and Order, p. 25.

NOAA Fisheries developed this biological opinion with the goal of fully complying with the Court’s Opinion and Order of May 7, 2003.

2.1.3 Hatchery Listing Policy and Status Reviews

In a September 12, 2001 order in *Alsea Valley Alliance v. Evans*, Judge Michael R. Hogan of the U.S. District Court in Eugene, Oregon found NOAA Fisheries’ definition of an ESU to be a permissible interpretation of “distinct population segment” for salmon. However, the Court determined that when NOAA Fisheries finds that an ESU includes both hatchery and naturally spawned fish, the agency may not permissibly list only the naturally spawned fish as threatened or endangered under the ESA. On these grounds, the Court set aside NOAA Fisheries’ 1998 ESA listing of Oregon Coast coho salmon.

In response to the *Alsea* decision, NOAA Fisheries has conducted a review to examine how the logic of the *Alsea* decision should be applied to those ESUs that include fish reared in hatcheries. This review entailed development of methods to determine which hatchery fish are part of the same ESU as naturally spawned fish and how the existence of ESU hatchery fish and their interactions with natural populations affect the prospects for survival of the entire ESU. The review was also extended to address the relationship of resident *O. mykiss* (rainbow or redband trout) to anadromous *O. mykiss* (steelhead) within the same ESU. NOAA Fisheries’ Biological Review Team (BRT) prepared a draft report on the updated status of 26 ESA-listed ESUs and one candidate species ESU of salmon and steelhead. This draft report was circulated for technical review and comments by state, Tribal, and Federal Comanagers. The final report, dated July 2003, can be accessed at www.nwr.NOAA.gov/AlseaResponse/20040528/index.html.

NOAA Fisheries published its proposed hatchery listing policy in the *Federal Register* on June 3, 2004 (69 FR 31354) and its proposed rule to revise the listing status of 25 currently listed Pacific salmonid ESUs and to list two additional ESUs (including Oregon Coast coho) on June 14, 2004 (69 FR 33102). These proposals include listing of over 100 hatchery populations of salmon and steelhead and the listing of some resident rainbow trout. The original 90-day public comment periods on these proposals were to end on September 1, 2004 for the proposed hatchery listing policy and September 13, 2004 for the proposed listing rule. NOAA Fisheries extended the comment periods for both proposals until November 12, 2004. Additional information, including details on public meetings, can be found at: <http://www.nwr.NOAA.gov/AlseaResponse/20040528/ltrstkhldrs.pdf>. NOAA Fisheries must make final decisions on the proposed listing rule by June 14, 2005. Promptly thereafter, notice of those decisions and rules will be sent to the *Federal Register* for publication. NOAA Fisheries expects to adopt a final hatchery listing policy several months before issuing the final listing revisions rule. NOAA Fisheries will use that final policy in making its final listing decisions.

2.1.4 Redesignation of Critical Habitat

Critical habitat had been designated for 12 of the species of salmon and steelhead considered in this opinion. However, on April 30, 2002, the United States District Court for the District of Columbia adopted a consent decree resolving the claims in *National Homebuilders, et al. v. Evans*, Civil Action No. 00-2799 (CKK) (D.D.C., April 30, 2002). Pursuant to that consent decree, the court issued an order vacating critical habitat designations for a number of listed salmonid species, including UCR spring chinook and steelhead, SR steelhead, MCR steelhead, UWR chinook and steelhead, LCR chinook and steelhead, and CR chum salmon. NOAA is in the process of completing new critical habitat designations, which are expected to be proposed on November 30, 2004.

2.2 CURRENT CONSULTATION

NOAA Fisheries and the Action Agencies intend that this Biological Opinion and the Updated Proposed Action it evaluates will replace the 2000 FCRPS Biological Opinion and its Reasonable and Prudent Alternative (RPA). This is the outcome of a process that began over a year and a half ago when the Court, in *NWF v. NMFS*, discussed above, determined that the 2000 Opinion was flawed. NOAA Fisheries initially embarked on the court-ordered year long remand to address the Court's concerns about NOAA Fisheries' reliance on certain future actions and to reconsider the jeopardy analysis for the FCRPS that would be consistent with the Court's interpretation of the consultation regulations. See, Federal Defendant's First Quarterly Status Report, p. 2 (10/1/03).

Seven months after NOAA Fisheries undertook the review of its Opinion pursuant to the remand, the states and tribes proposed a collaborative process to discuss technical issues as well as the analytical framework for reaching determinations about jeopardy. For four months in the winter and spring of 2004, NOAA Fisheries participated in nineteen facilitated sessions with state and tribal representatives and other interested parties, in which the participants discussed the intrinsic potential of habitat, effects of hatchery operations, effects of FCRPS operations, population trends, and the analytical framework for ESA jeopardy determinations.

In recognition of the time and effort committed to the collaborative process, the Court extended the remand until November 30, 2004, and the issuance of this biological opinion. On September 8, 2004, NOAA Fisheries released a draft of this biological opinion for co-manager review. The Action Agencies released a draft of their Updated Proposed Action at the same time. NOAA Fisheries received over 46,000 separate comments on its draft Opinion including detailed comments from each of the Columbia Basin states and tribes, which also have management responsibilities for salmon.

NOAA Fisheries and the Action Agencies embarked on this remand with the expectation that they would build upon the RPA of the 2000 Opinion for the purpose of responding to the Court's concerns. The Action Agencies' UPA was therefore developed with the RPA as its starting point. The similarities and differences between the UPA and the RPA can be found in the RPA Crosswalk posted at www.salmonrecovery.gov. These significant changes were necessary to address the Court's interpretation of the ESA consultation regulations, recently available

scientific data, and new information about specific operations, modifications, and non-hydro projects. Recent developments in ESA caselaw also necessitated further revisions from the 2000 Opinion, such as the analysis of effects on designated critical habitat. For these reasons, this 2004 Biological Opinion and the 2004 UPA supercede all previous consultations for the FCRPS.

2.3 MEETINGS WITH STATE AND TRIBAL REPRESENTATIVES

After issuing the State/Tribal Review Draft of this Opinion on September 8, 2004, staff of NOAA Fisheries Hydropower, Salmon Recovery, and Habitat Conservation divisions met with state and Tribal technical and policy staff on September 13, 15, and 16, 2004. The purpose of these meetings was to provide an overview and to answer questions, thus facilitating the Comanagers' review of the draft Opinion. Secondly, the meetings were expected help the participants brief their policy counterparts, in preparation for the policy-level meetings scheduled in early October. Action Agency staff also participated in the meetings and provided information on their Updated Proposed Action. Dates and locations of the staff- and policy-level meetings are shown in Table 2.1.

Table 2.1. Consultation and conferencing with representatives of state and tribal governments on development of the 2004 FCRPS Biological Opinion.

Date	Location	Affiliations
September 13, 2004	Upper Columbia United Tribes (UCUT) Office, Spokane, WA	Kalispel Tribe, Spokane Tribe, Confederated Tribes of the Colville Reservation, Kootenai Tribe of Idaho, Coeur d'Alene Tribe of Idaho, UCUT staff
September 15, 2004	NOAA Fisheries Office, Boise, ID	Shoshone-Bannock Tribes of Ft. Hall, Shoshone-Paiute Tribes of Duck Valley
September 16, 2004	NOAA Fisheries Office, Portland, OR	Implementation Team – including representatives of Montana, Idaho, Oregon, Nez Perce Tribe of Idaho, Columbia Basin Fish and Wildlife Authority, Save Our Wild Salmon, Pacific Northwest Utilities Conference Committee, Northwest Power and Conservation Council, PNGC Power, and Fish Passage Center
October 5, 2004	NOAA Fisheries Office, Portland, OR	Representatives of the Governors' Offices of the States of Idaho, Montana, Oregon, and Washington
October 8, 2004	Red Lion Inn, Portland, OR	Shoshone-Bannock Tribes, Confederated Tribes of the Warm Springs Reservation of Oregon, Columbia River Inter-tribal Fish Commission, Yakama Nation, Umatilla Tribes
October 15, 2004	Red Lion Inn at the Park, Spokane, WA	Coeur d'Alene Tribe of Idaho, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon

2.4 COLLABORATION WITH COMANAGERS

In January 2004, the parties to *National Wildlife Federation et al. v. National Marine Fisheries Service* agreed to embark on a collaborative process proposed by the Comanagers. The process included three stages: (1) scoping of issues; (2) Comanager review of data; and (3) workshops for discussion of questions, concerns, and suggestions arising from that review. The professional facilitation firm, DS Consulting, was hired to plan meetings, facilitate discussions, and provide written workshop summaries.

The process began on February 12, 2004 at a joint Steering Committee meeting, where the group agreed to five specific areas for discussion: intrinsic potential of habitat; hatcheries; hydro operations and actions, including effects, the estuary, and dam passage; population trends; and the analytical framework. Representatives from the Comanagers' agencies interacted with NOAA Fisheries representatives in sessions held between February and May of 2004. These sessions were also attended by Action Agency representatives and plaintiff and defendant observers.

2.5 RECOVERY PLANNING

Section 4(f) of the ESA directs NOAA Fisheries to develop and implement recovery plans for the ESUs addressed in this Opinion. "To the maximum extent practicable" each plan shall incorporate:

- Site-specific actions necessary to achieve goals for conservation and survival.
- Objective measurable criteria for delisting the species.
- Estimates of the time and cost for implementing the recovery plan.

While NOAA Fisheries is legally responsible for developing and implementing recovery plans, Section 7(a)(1) of the ESA directs all Federal agencies, in consultation with NOAA Fisheries, to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species..." NOAA Fisheries is coordinating work with other Federal agencies through the Federal Caucus.

NOAA Fisheries and the Action Agencies believe that the plans will have a greater likelihood of success if developed in partnership with other stakeholders, including those that have the responsibility and authority to implement recovery actions. Current efforts that will provide a strong foundation for ESA recovery plans in the Columbia River basin include the Northwest Power and Conservation Council's subbasin plans and the State of Washington's regional recovery plans. NOAA Fisheries is assisting Council subbasin planning and State of Washington recovery planning groups as they develop assessments, strategies, and actions. Initial drafts of subbasin plans have addressed primarily habitat issues, and NOAA Fisheries is working with local, state, and Tribal organizations to integrate hatchery, harvest, and hydro issues into the plans (as described below).

As recovery plans are developed and finalized, they will take into account biological opinions, Habitat Conservation Plans (HCPs), Federal Energy Regulatory Commission (FERC) license agreements, settlement agreements resulting from litigation (e.g., *U.S. v. Oregon* and *U.S. v. Washington*), and other existing arrangements. Once completed, the recovery plans are intended to provide a roadmap to recovery. They will provide a context for future biological opinions, HCPs, FERC license renewals, and other actions. They are intended to help organize, coordinate, and prioritize recovery actions to achieve biological goals in the most effective and efficient manner possible.

2.5.1 Status of Recovery Planning

NOAA Fisheries expects draft recovery plans for all listed Columbia basin ESUs that spawn and rear in the State of Washington to be written by June 2005. The first draft State of Washington regional recovery plan will be available from the Lower Columbia Fish Recovery Board in December 2004. Assuming that the plans are consistent with guidance endorsed by NOAA Fisheries, including the State of Washington's Salmon Recovery Plan Model and the Northwest Power and Conservation Council's Technical Guide, NOAA Fisheries expects to endorse them as "Interim Local Recovery Plans." These plans are "interim," because they may require the addition of elements for hydro, hatchery, and harvest actions (i.e., some of the Washington Recovery Boards have indicated that they may only address habitat actions) and may need components developed for populations in Oregon and Idaho. Washington's regional recovery boards have been coordinating with both Columbia basin TRTs, and it appears that their recovery plans will address TRT viability recommendations. NOAA Fisheries intends to formalize these interim plans as ESA recovery plans as soon as possible. The status and timing of recovery plans for portions of ESUs in Oregon and Idaho is less clear. NOAA Fisheries intends draft plans to be developed, to the extent possible, for the "bi-state" mid-Columbia steelhead and "tri-state" (Snake River spring/summer chinook, fall chinook, steelhead, and sockeye) ESUs by December 2005.